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In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

CAREY EUGENE SIMPSON,
PETITIONER,

versus

STATE OF SOUTH CAROLINA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The memorandum opinion of the South Carolina Supreme Court is reported at *State v. Carey Eugene Simpson*, ___ S.C. ___, 272 S.E. 2d 431 (1980).

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Did the standard used by the South Carolina Supreme Court in evaluating the sufficiency of the evidence to justify conviction abridge Petitioner's rights to due process of law by requiring evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced and was the issue waived by failure to present it in the South Carolina Supreme Court?

II.

Was evidence seized from Petitioner and from his airplane the result of an illegal search?

STATEMENT OF CASE

Petitioner was tried for possession of marijuana with intent to distribute, under South Carolina Code Section 44-53-370 (1976), in the Court of General Sessions for Kershaw County, South Carolina, on May 17 and 18, 1979. The State's evidence proved that Appellant had used a twin engine Cessna 421 Airplane to smuggle a quantity of marijuana into South Carolina, landing at the Camden Airport in Kershaw County, South Carolina, on March 17, 1979. The State presented testimony of an expert on smuggling activities to prove certain indicators which would show that a person had, in fact, been involved in smuggling illegal drugs. He testified that, when an aircraft is involved in the operation, one indicator would be pits and grass stains on the tips of propellers, showing that the plane had been landing and taking off on grass strips, a practice which is especially uncommon for executive type aircraft since they are commonly used for asphalt air strips. Pilots who are generally engaged in smuggling contraband will be reluctant to discuss their point of departure or destination, or will simply give a false statement as to their routes. Smugglers will remove seats from an aircraft in order to

provide more room for carrying large quantities of contraband. Also, if a large quantity of marijuana has been used in an aircraft, some of the marijuana will come out of its package while in transit — this is normally called residue.

The State then presented evidence which showed that Appellant flew a twin engine Cessna 421 into the Camden Airport, in South Carolina, under the assumed name of James A. Westerman. This type of twin engine aircraft would be worth about $225,000. Petitioner gave his flight plan as being from Atlanta to Charleston, even though Camden was approximately 50 miles off the normal route for such a journey. Local law enforcement officers had been notified that Petitioner's airplane had entered the continental United States that morning without clearing customs, appearing on and off the radar screen. When the officers arrived at the Camden Airport and approached Petitioner's airplane (he had since departed the vicinity for a local motel) they were able to view through an open window of the aircraft residue of a certain material which appeared to be marijuana on the seats and floor. The officers could obtain this view while standing on the ground, and no other assistance was used to scan the interior of the vessel. The law enforcement officers then proceeded to obtain a search warrant from a local magistrate to search the airplane, and upon executing the warrant they were able to retrieve 3.47 grams of marijuana from the floor and seats of the aircraft. A copy of the search warrant affidavit is reprinted as Appendix 1 to this Brief. The craft had at least two of the seats missing from the rear compartment, and, in addition to the marijuana on the carpet and on the seats of the aircraft, there was a "good bit" of marijuana residue in the forward part of the aircraft which they were unable to obtain. The propellers on the Petitioner's executive-type aircraft showed pit marks and grass stains, indicating that it had been taking off and landing in an unimproved type of airfield. The marijuana residue was described as being recently processed marijuana, and its chemical identity was confirmed by means of a test performed at the scene. The expert testified that the quantity of marijuana retrieved from the aircraft was sufficient for use or distribution.

Petitioner was arrested that evening by local law enforcement authorities who informed he by telephone to his room that he was under arrest and that he should surrender. Petitioner opened the door to his motel room, turned, and placed his hands on the facing of the doorway. The first law enforcement officer to the room walked inside the doorway and saw an open flight bag within Petitioner's reach. The officer glanced inside the open bag to determine whether it contained a weapon, discovering certain aeronautical maps showing Petitioner's flight plans to the great Inagua Islands, Haiti, and South America. The maps were admitted into evidence at trial. A search of Petitioner's person revealed a United States passport registered in the name of Carey Eugene Simpson and cash in the amount of $1,788.13, mainly consisting of $100 bills. The motel registration showed that Petitioner had used his assumed name of James A. Westerman. After the arrest, Petitioner made the comment to officers that "he really couldn't say too much, because he was afraid for the safety of his wife and children."

Petitioner was convicted in the trial court, and the conviction was affirmed by the South Carolina Supreme Court on November 10, 1980. Petition for rehearing was subsequently denied.

ARGUMENT

I.

The standard used by the South Carolina Supreme Court in evaluating the sufficiency of the evidence to justify conviction did not abridge Petitioner's rights to due process of law by requiring evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced; in any event, the issue was waived by failure to present it in the South Carolina Supreme Court. (Petitioner's Question I)

On appeal to the South Carolina Supreme Court, Petitioner never questioned the adequacy of the standard in

South Carolina for reviewing the sufficiency of the evidence in a criminal conviction. In fact, Petitioner relied exclusively upon applicable State law on this subject. In South Carolina, the failure to argue a particular issue in the Brief constitutes waiver. *State v. Vaughn,* 268 S.C. 119, 232 S.E. 2d 328 (1977). See, generally, West's South Carolina Digest, *Criminal Law,* Key No. 1178. Therefore, the issue is not properly before this Court. *Gooding v. United States,* 416 U.S. 430, 444, n. 19, 40 L. Ed. 2d 250, 260, n. 19, 94 S. Ct. 1780 (1974). In order to overcome this defect, Petitioner must show exceptional circumstances for errors which seriously affect the fairness or integrity of judicial proceedings. *Anderson v. United States,* 417 U.S. 211, 41 L. Ed. 2d 20, 94 S. Ct. 2253 (1974). Respondent would respectfully submit that Petitioner has failed to demonstrate the efficacy of his contention.

The opinion of the South Carolina Supreme Court clearly demonstrates that evidence which would merely raise a suspicion as to Petitioner's guilt would not be sufficient to justify conviction but, rather, must be such as would reasonably, or fairly and logically, tend to prove his guilt. Consequently, the South Carolina standard for determining the sufficiency of the evidence would require a degree of proof far exceeding the "any evidence" standard condemned by this Court in *Jackson v. Virginia,* 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979), holding that the relevant question as to sufficiency of the evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.,* 443 U.S. at 319, 61 L. Ed. 2d at 573. It should also be noted that this standard would not require excluding every reasonable hypothesis other than the guilt of the accused. *Id.,* 443 U.S. at 326, 61 L. Ed. 2d at 578. The South Carolina requirement that the evidence reasonably and logically prove guilt and not a mere suspicion would comport with *Jackson* under recent interpretations. See *United States v. Hamilton,* 626 F. 2d 348 (4th Cir. 1980) (evidence must make any factual conclusion "reasonable"); *United States v. Laughman,* 618 F.

2d 1067 (4th Cir. 1980), *cert. den.* 100 S. Ct. 3018 (evidence sufficient from all reasonable inferences); *Brewer v. Overberg,* 624 F. 2d 51 (6th Cir. 1980) (evidence justifying the reasonable inferences of guilt by a reasonable juror); *United States v. Melchor-Lopez,* 627 F. 2d 886 (9th Cir. 1980) (evidence must prove more than a mere suspicion).

Cases in which the South Carolina standard for determining sufficiency of the evidence has been utilized to the benefit of criminal defendants would clearly show that South Carolina does not require an Appellant to show "no evidence" of his guilt. *In Re Willie Lee Washington,* ___ S.C. ___, 272 S.E. 2d 34 (1980); *State v. Woods,* 273 S.C. 266, 255 S.E. 2d 680 (1979); *State v. Hendrix,* 270 S.C. 653, 244 S.E. 2d 503 (1978).

In this case, Petitioner claims the State had insufficient evidence to prove his intent to distribute the marijuana contained in his aircraft. However, it is clear that the State was not relying upon Petitioner's "mere" possession of marijuana to prove his intent to distribute, but, rather, the State relied on attendant facts and circumstances showing that Petitioner was in the business of distributing marijuana for profit. Such evidence is relevant on the issue of intent to distribute. *State v. Hammond,* 270 S.C. 347, 242 S.E. 2d 411 (1978); *State v. Durham,* 263 S.C. 263, 222 S.E. 2d 768 (1976); *State v. Matarazzo,* 262 S.C. 662, 207 S.E. 2d 93, *cert. den.,* 420 U.S. 945, 43 L. Ed. 2d 423, 95 S. Ct. 1324 (1974).

II.

Evidence seized from Petitioner and from his airplane was not the result of an illegal search. (Petitioner's Questions II and III.)

Petitioner incorrectly assumes that *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1969) is applicable inasmuch as the cited authority merely condemns planned *warrantless* seizures of items in plain view. As noted in the Statement, this case involves a seizure pursuant to a search warrant. There was no "search" merely by the law enforcement officers' viewing the contraband in

Petitioner's aircraft since they had a right to be in the position to have that view. *Harris v. United States,* 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992 (1968).

Petitioner's claim that the search of his flight bag, located within his reach at the time of arrest, was overly broad is likewise without merit. Clearly, the open flight bag was within the area of Petitioner's immediate control, and was subject to a search incident to arrest. *United States v. Chadwick,* 443 U.S. 1, 53 L. Ed. 2d 538, 97 S. Ct. 2476 (1977); *United States v. Robinson,* 414 U.S. 218, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973); *Chimel v. California,* 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034, *reh. den.* 396 U.S. 869, 24 L. Ed. 2d 124, 90 S. Ct. 36 (1969).

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX I

On 3-17-79 in the A.M. this aircraft entered the United States without clearing the United States Customs. Aircraft had filed flight plan from Jamaica to Mexico this same morning.

Upon entry to the United States the U. S. Air Force scrambled fighters on this plane, and the Air Force got a positive identification on the aircraft, number of N3923C.

The plane flew into the coast around Edisto Island, South Carolina, and circled the airstrip on Edisto. Aircraft was on and off the radar screen as if trying to avoid radar contact.

At approximately 3:40 P.M. the aircraft landed at the Camden Airport with curtains partially drawn. Pilot claimed to have been on a ferry from Atlanta, Georgia to Charleston, South Carolina, which is obviously incorrect, because Camden is not in line from Atlanta to Charleston.

Special agent in charge, Steven H. Smith, was telephoned by a confidential source regarding this plane.

Propellers have grass stains and pits in them that indicates that the plane had landed and taken off from a grass strip, or an unimproved strip.

Affiant observed what appears to be marijuana residue inside the plane. Residue visible from the outside through the windows.

According to records with the Federal Aviation Administration this aircraft is registered to a business in Rifle, Colorado, and pilot claims to work for a business in New Mexico.